

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARL EMBERGER,	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 96-7043
v.	:	
	:	
DELUXE CHECK PRINTERS	:	
Defendant.	:	

M E M O R A N D U M

BUCKWALTER, J.

October 30, 1997

Presently before the court is Defendant's motion for summary judgment (Docket No. 15), Plaintiff's answer (Docket No. 18) and Defendant's response thereto (Docket No. 19). For the following reasons Defendant's motion is granted.

I. BACKGROUND

Generally, Plaintiff, Carl Emberger ("Emberger"), alleges that he was discriminated against by his employer Defendant, Deluxe Check Printers ("Deluxe"), because he suffered from depression and anxiety attacks. Deluxe justifies its actions regarding Emberger on the basis that he continuously disobeyed company orders not to contact Beth Hunt ("Hunt"), another Deluxe employee. Therefore a brief description of Emberger's depression, anxiety and relationship with Hunt, as evidenced by the record before me, is necessary.

A. Depression and Anxiety

In May of 1994, Emberger, who was employed as a Regional Systems Support Manager ("RSSM"), began suffering from depression. He became withdrawn, had trouble sleeping and began to lose touch with his family. By July 1994, Emberger also began suffering from anxiety attacks that made him feel shaky and feverish and on occasion caused him to completely "freeze up." To recover from these attacks, Emberger would take walks around the parking lot until he could regain his composure and return to work.

In August 1994 Emberger approached his manager, Luann Widener ("Widener"), about using Deluxe's Employee Assistance Program ("EAP"). EAP is designed to provide assistance for employees with personal problems and Deluxe employees are entitled to three sessions with an EAP provider at no cost. Accordingly, Emberger was given a pamphlet about the program and met three times with an EAP therapist, Bob Shiraldi ("Shiraldi"). Shiraldi referred him to another therapist, Janet Barkowski ("Barkowski"), with whom Emberger met three times. Eventually, of his own accord, Emberger began seeing Dr. Keller¹, a psychiatrist, unassociated with EAP, who diagnosed him as suffering from depression and anxiety and prescribed Paxil and

1. The record does not reveal Dr. Keller's first name and is inconsistent as to the spelling of his last.

Xanax that relieved most of Emberger's symptoms. Emberger's medication occasionally made him feel groggy or sleepy in the morning.

B. Beth Hunt

Emberger and Hunt's relationship began in 1993. According to Emberger, Hunt, whom Emberger supervised, was always "very flirtatious" and often made sexual innuendos when speaking with him. For example, Emberger claimed that at a going away party in 1993, Hunt stunned him when, unsolicited, she suddenly sat on his lap. According to Emberger, after several "advances" from Hunt, they began to meet occasionally during off hours in the parking lot or a conference room closet for kissing and hugging sessions. Additionally, Hunt and Emberger spent much time together during office hours, frequently exchanged voice mail messages and shared their lunch hour.

At his deposition, Emberger testified that sometime in September 1994 Hunt "severed ties." She no longer lunched with him and started treating him like a "nonperson." By the end of the month, however, the two had resumed their friendship, but, this time the relationship was strictly work-related, the romance had ended. Around this time, Widener warned Emberger that she was aware of his relationship with Hunt. Widener also approached Hunt and asked if the relationship was consensual. Hunt informed

her that no relationship existed and then told Emberger that "she had no intention of having a relationship with him."

In January 1995, while Emberger was on vacation, Hunt was given a letter from Emberger, which he had left with another Deluxe employee for safekeeping. In the letter Emberger professed his love for Hunt and in closing stated "If you are reading this letter I'm obviously not in this world." Fearing it was a suicide note, Hunt turned the letter over to the Deluxe's Regional Facilities Manager, Stephen Cushman ("Cushman"), and Vice President, Regional Manager, William Trautschold ("Trautschold") and complained that Emberger continued to make unwanted advances towards her.

Worried about Emberger's safety, Cushman contacted Shiraldi, who advised that Deluxe construe the letter as a serious suicide threat. Cushman and Trautschold tried to contact Emberger while on vacation, but with no success. Upon Emberger's return, Cushman and Trautschold confronted him with the letter and discussed the possibility that it might be demonstrative of suicidal tendencies; questioned him about his relationship with Hunt; and informed him that Hunt felt she was being sexually harassed. Emberger admitted that he had been suffering from severe depression but denied having any thoughts of suicide. Cushman and Trautschold requested permission to speak to Dr. Keller to verify that Emberger was undergoing treatment and

directed Emberger to have no further direct contact with Hunt or indirect contact with her through other Deluxe employees.

Emberger was immediately suspended with pay and told to keep in contact. On January 16, 1995, Emberger called Dr. Keller and requested that he "speak to Steve [K]ushman 251-0300 his boss as [patient] charged with sexual harassment by a woman he was infatuated with."

At a lunch meeting in mid-January Cushman informed Emberger that it was the company's position that harassment had occurred. At this meeting, Emberger submitted a five page handwritten explanation of his relationship with Hunt in which he took full responsibility. On January 25, 1995, Cushman informed Emberger that he could return to work as a Staff Specialist (a demotion from his former position) at a \$10,000 reduction in salary. Emberger accepted the offer and reported to work on February 3, 1995, but, never actually received a reduction in salary.

Shortly after his return to work, Trautschold began receiving reports that Emberger was contacting other Deluxe employees about Hunt. Consequently, Trautschold reminded Emberger that such contact was prohibited. Additionally, at this time, a notice was posted in Deluxe requesting Deluxe employees to hold a five minute silent protest in support of Emberger. A formal complaint letter against Hunt, containing intimate details

of Hunt and Emberger's relationship, (the "Complaint Letter"), in which the reinstatement of Emberger was requested was also sent to Trautschold. Outraged by the anonymous protest notice and the Complaint Letter, Cushman and Trautschold began investigating the source of both. After examining printer ribbons in a training room that Emberger had primary access to Cushman concluded that Emberger had probably written the silent protest notice.

On March 1, 1995, Widener replayed for Cushman and Trautschold a voice mail message she had received from Emberger in which he expressed interest in Hunt's whereabouts and closed by stating "I know it's strange but I still care about her." This was the second voice mail Widener had received from Emberger regarding Hunt. Additionally, around the same time a copy of the Complaint Letter was mailed to Hunt's husband, Chris Hunt, at his place of work. Infuriated Mr. and Mrs. Hunt came in to talk to Cushman and Trautschold about this continued "harassment." By comparing the handwriting on the envelope with Emberger's, Cushman concluded that Emberger had been directly involved in mailing the Complaint Letter to Chris Hunt. Based on this finding Cushman sought the advice of Shiraldi and Barkowski to determine if Emberger posed a serious threat to Hunt and what if any action should be taken.

During a visit by Emberger with Dr. Keller on March 3, 1995, Dr. Keller informed Emberger of recent phone inquiries he

had received from Cushman. According to Dr. Keller's notes, Cushman told Dr. Keller that Barkowski had classified Emberger as a "sexual addict" who "would never improve" and that Cushman believed Emberger was "stalking" Hunt. Dr. Keller informed Cushman that he did not consider Emberger a "sexual addict" and did not believe that Emberger was stalking or in anyway interested in Hunt. Upon his return to work, Emberger immediately confronted Trautschold and Cushman about their contacts with Dr. Keller. According to Emberger he was so infuriated with the situation he "blew up." Cushman and Trautschold then informed Emberger that he was terminated. Emberger cleared out his desk and left Deluxe premises.

According to Cushman's affidavit and notes, the decision to terminate Emberger was based on his failure to follow their specific instructions not to have contact with or make inquiries about Hunt. This decision was reached after considering the possibility of having Emberger committed to an inpatient psychiatric program for treatment of "obsessive" behavior. However, after consulting a mental health expert specialist at Deluxe, Cushman and Trautschold concluded that further treatment would be futile and that the only sensible course of action available was termination.

II. LEGAL STANDARDS

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When considering a motion for summary judgment this court must view all evidence in favor of the non-moving party. Bixler v. Central Pennsylvania Teamsters Health and Welfare Fund, 12 F.3d 1292, 1297 (3d Cir. 1993); Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 (3d Cir. 1983), cert. denied, 465 U.S. 1091 (1984). To successfully challenge a motion for summary judgment, the non-moving party must be able to produce evidence that "could be the basis for a jury finding in that party's favor." Kline v. First Western Government Securities., 24 F.3d 480, 485 (3d Cir.), cert. denied, 513 U.S. 1032 (1994).

III. DISCUSSION

Emberger claims that Deluxe discriminated against him by subjecting him to a hostile work environment, invading his privacy, demoting and ultimately terminating him because he suffered from the disabilities of manic depression and anxiety and that such actions amounted to a violation of the American with Disabilities Act ("ADA")(Count I) and the Pennsylvania Human

Relations Act ("PHRA")(Count IV)². Emberger further alleges that Deluxe's actions constituted an invasion of privacy (Count III) and breach of contract (Count II) in violation of Pennsylvania law.

A. Counts I and IV: Disability Discrimination

Neither party disputes the following. First, that Emberger's PHRA claim may be treated as coextensive of his ADA claim. Pennsylvania courts generally interpret the PHRA in accordance with its federal counterpart and the PHRA's definition of "handicap or disability" is substantially similar to the definition of "disability" under the ADA. See Gomez v. Allegheny Health Services Inc., 71 F.3d 1079, 1083-84 (3d Cir. 1995) cert. denied 116 S.Ct. 2524 (1996); Fear v. McLean Packaging Corporation, 860 F.Supp. 198, 200 (E.D. Pa. 1994). Second, that the burden shifting framework (plaintiff's prima facie case, non-discriminatory reason proffered by defendant and plaintiff's rebuttal) utilized in Title VII cases is applicable to the instant case. See, McNemar v. Disney Stores, Inc., 91 F.3d 610, 619 (3rd Cir. 1996); See also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

2. As discussed in Section "B" entitled "Count II: Breach of Contract", Emberger's claims of invasion of privacy (also characterized as breach of confidentiality agreement) and "hostile work environment" are unsupported by the record. Therefore, I discuss only Emberger's claims that he was demoted and ultimately terminated in violation of the ADA and the PHRA.

I conclude that Emberger has established a prima facie case of disability discrimination³ and base my dismissal of his claims instead on my finding that he has failed to adequately rebut Deluxe's proffered non-discriminatory reason.

To defeat summary judgment when the defendant answers the plaintiff's prima facie case with legitimate, non-discriminatory reasons for its action, the plaintiff must point to some evidence, direct or circumstantial, from which a fact finder could reasonably either; (1) disbelieve defendant's articulated legitimate reason or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. Fuentes v.

3. In the context of employment discrimination the burden of establishing a prima facie case is not an onerous one. See generally, Bryant v. International School Services Inc., 675 F.2d 562 (3d Cir. 1982); 42 U.S.C. 2000e et seq. Because Emberger has provided no direct proof of discrimination the following indirect analysis applies. He must demonstrate that; 1) he is a member of a protected class -- in this case a "qualified individual with a disability"; 2) his work performance met Deluxe's legitimate job expectations; and 3) he suffered adverse employment actions. See Lawrence v. National Westminster Bank New Jersey, 98 F.3d 61, 68 n.9 (3d Cir. 1996). Emberger is not required to proffer evidence of a causal relationship between his disability and his demotion and termination. Id. at 68.

First, Emberger has proven that he is disabled, as the term is defined by the ADA, because he was "perceived as disabled." See 42 U.S.C. § 12102(2). It is uncontroverted that upon his return to work in January 1995, Cushman and Trautschold questioned Emberger about his mental state and requested permission to contact his psychiatrist in order to confirm that he was undergoing treatment. Additionally, on more than one occasion, Emberger informed management at Deluxe that he had been diagnosed as suffering from major depression and anxiety and that he took medication for these conditions. Finally, in notes taken just prior to Emberger's termination Cushman refers to the possibility that Emberger should be given "one last opportunity to seek additional help for what appears to be a mental health disorder."

Second, neither party questions that Emberger met the requisite qualifications of his position. Finally, the record reveals that Emberger was demoted in January 1995 and was terminated in March 1995. Thus, I find that Emberger has established a prima facie case of disability discrimination.

Perskie, 32 F.3d 759, 764 (3d Cir. 1994). The plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." Id. at 765 (internal citations, quotations and brackets omitted).

Deluxe contends that its actions were justified as Emberger flagrantly disobeyed the company's orders not to have any contact with Hunt. The record reveals and Emberger admits that he did in fact disobey such orders. On rebuttal, however, Emberger claims that his failure to follow orders was not the motivating factor in his dismissal. The essence of Emberger's rebuttal argument is that his termination notice and Cushman's notes provide evidence from which a jury could conclude that Deluxe's articulated reason is pretextual.

Emberger asserts that notice of his termination, in which the stated reason for termination is "Inability to get along with others", provides "[t]he most compelling evidence refuting the Defendant's proffered reason"

The implication Emberger seeks the court, and ultimately a jury, to draw is that his "inability to get along with others" was a manifestation of his disability and therefore

the notice is evidence that he was terminated because of his disability rather than for failure to follow orders.

Additionally, Emberger argues that because Deluxe's proffered reason is different than the reason provided on his termination notice, the proffered reason must be pretextual.

Emberger also points to selected passages from Cushman's notes. He finds the following statements taken from Cushman's January 16, 1995 notes (recounting the suicide note confrontation) as indicative of pretext:

"Bill [Trautschold] and I [Cushman] explained the level of concern the company had concerning the situation from both a harassment standpoint and also from Carl's mental health."

"Bill and I told Carl [Emberger] that based on the events of the past week and the past year and our knowledge of them it was clear that he could not stay in his current responsibilities."

"We told him that a condition of employment is to contact his current doctor and give us permission to discuss his treatment & [sic] progress in treatment based on this information we will determine what role Carl could fill and when he could return to work."

As further evidence of pretext, Emberger also refers the court to Cushman's notes taken just prior to his termination, which he claims supply a "plethora of evidence which a jury could reasonably use to decide that Deluxe's reasons are incredible."

I find that the evidence presented by Emberger fails to demonstrate that Deluxe's reason for termination is pretextual. First, I conclude that a rational finder of fact would not

interpret the phrase "inability to get along with others" as indicative of disability and therefore would not construe Emberger's termination notice as evidence that he was fired because he suffered from a disability. See Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 15 (1st Cir. 1997) (The concept of "ability to get along with other" is remarkably elastic, perhaps so much as to make it unworkable as a definition); Breiland v. Advance Circuits, Inc., -- F. Supp.--, 1997 WL 580598 (D. Minn. 1997)("inability to get along with others" is not evidence of a disability); See also Johnson v. Allyn & Bacon, Inc. 731 F.2d 64 (1st Cir.), cert. denied. 469 U.S. 1018, (1984)(An individual's "inability to get along with others" is a legitimate and non-discriminatory reason for an adverse employment decision.); Meiri v. Dacon, 759 F.2d 989 (2d Cir. 1985)(same); Frausto v. Legal Aid Society of San Diego, 563 F.2d 1324, 1328 (9th Cir. 1977)(same); Burrus v. United Telephone Co. Of Kansas, Inc., 683 F.2d 339, 342 (10th Cir.), cert. denied, 459 U.S. 1071 (1982) (same).

Furthermore, that Deluxe's proffered reason is different than the reason provided on the termination notice is not fatal. Based on the record before me, the discrepancy is not probative of discriminatory animus and does not create an issue of fact as to whether Deluxe's reason for demoting and terminating Emberger is pretextual.

Second, selected passages from Cushman's notes cited by Emberger, when read in the context within which they were written do not undermine Deluxe's proffered reason. Cushman's January 16, 1995 notes do contain discussion regarding Emberger's mental health, but, contrary to Emberger's assertion, the subject is clearly tangential to Deluxe's primary concern, Emberger's inappropriate relationship with his subordinate Beth Hunt. Furthermore, Emberger mischaracterizes the tenor of Cushman's notes prior to termination. Rather than provide evidence of pretext, they demonstrate the reasonable, difficult and thorough process Deluxe embarked upon before deciding to terminate. In dismissing Emberger, Deluxe was forced to strike a balance between appreciating and understanding the root of Emberger's "obsessive" and "harassing" behavior and protecting Hunt. In this regard, the notes reveal that Deluxe was cognizant of Emberger's depression and of the fact that his depression and his behavior towards Hunt were linked. However, it is apparent, and understandably so, that Deluxe's ultimate concern was for the safety of Hunt and therefore the company was compelled to terminate. As even Emberger himself admitted, his conduct with Hunt was wrong and that although his depression may have explained this behavior it certainly did not excuse it. Accordingly, Deluxe's motion as it pertains to Counts I and IV is granted.

B. Count II: Breach of Contract

Emberger claims that the following statement, from the EAP pamphlet he received, created an implied contract which was breached when Cushman contacted Keller, Shiraldi and Barkowski.

"IS THE EAP CONFIDENTIAL ?

Confidentiality is a key element in the success of the EAP. Discussions with your facility manager and/or outside are confidential."

Emberger also claims that, as part of his transfer to Staff Specialist, Deluxe forced him to work in a "hostile work environment" contrary to provisions contained in Deluxe's employee handbook. He states that he was forced to work in a cubicle that was "crammed full of filing cabinets and covered with ink dust and noisy."

It is settled under Pennsylvania law that an employee handbook does not overcome the employment at-will presumption unless the handbook's language clearly expresses that the employer intended such result. Ruzicki v. Catholic Cemeteries Ass'n, 610 A.2d 495, 497 (1992). Based on this principle, several courts have found that employers' statements of specific policies, practices, and treatment in employee handbooks are enforceable against employers as contractual rights. Banas v. Matthews International Corporation, 502 A.2d 637, 656 (Pa. Super. 1985).

Presuming, for purposes of summary judgment review only, that the pamphlet created a binding confidentiality agreement, Deluxe's actions did not constitute breach. The record reveals that; (1) Deluxe contacted Shiraldi out of genuine concern for Emberger's well being when faced with what appeared to be a suicide note; (2) Deluxe consulted Shiraldi and Barkowski only to determine whether or not Emberger posed a serious threat to Hunt; and 3) Emberger consented to Deluxe's contact with his psychiatrist, Dr. Keller.

Also, Emberger's "hostile work environment" claim is unfounded. The only evidence produced relevant to Emberger's work environment is his description, which fails to convince me that there was anything inappropriate about the state of his work conditions. Furthermore, Deluxe's handbook does not contain any provision guaranteeing a "hostility free" environment. In fact the first page of the handbook clearly states:

**"It does not create a contract of employment
This handbook applies to full-time employees only, each
of whom serves at the will of the company."
(Emphasis in original)**

Therefore, Deluxe's motion as it pertains to Count II is granted.

C. Count III: Invasion of Privacy

Invasion of privacy encompasses four analytically distinct torts: 1) intrusion upon seclusion; 2) appropriation of name or likeness; 3) publicity given to private life; and 4)

publicity placing the person in a false light. Curran v. Children's Service Center of Wyoming Inc., 578 A.2d 8, 12 (Pa. Super. 1990). Because Count III is entitled "Public Disclosure of Private Facts", I will assume Emberger asserts a claim of publicity given to private life. Emberger claims that the private details of his life were exposed when Cushman and Trautschold contacted Keller, Shiraldi and Barkowski and discussed his employment status with Hunt.

Deluxe contends that Emberger's claim is barred by the exclusive remedy provision (the "exclusivity provision") of the Pennsylvania's Worker's Compensation Act ("WCA") 77 P.S. § 481(a). The exclusivity provision bars common law claims against employers for intentional torts arising out the employment relationship, including claims by employees to recover for emotional damage. Hicks v. Arthur, 843 F. Supp 949, 957 (E.D.Pa. 1994); See Schaffer v. Procter & Gamble, 604 A.2d 289 (Pa. Super. 1992). Only personally motivated intentional acts of third persons do not fall within the exclusive coverage of the WCA. Danes v. Morrison-Knudsen/Slattery, 784 F.Supp 228, 229 (E.D.Pa.) aff'd, 975 F.2d 1549 (3d Cir. 1992). Accordingly, I conclude that Emberger may not recover for publicity given to private facts based on Cushman and Trautschold's contacts with Dr. Keller, Shiraldi and Barkowski and the updates they provided

Hunt regarding Emberger's status. Therefore, Deluxe's motion as it pertains to Count III is granted.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARL EMBERGER,	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 96-7043
v.	:	
	:	
DELUXE CHECK PRINTERS	:	
Defendant.	:	

O R D E R

AND NOW, this 30th day of October, 1997, upon consideration of Defendant's motion for summary judgment (Docket No. 15), Plaintiff's answer (Docket. No. 18) and Defendant's reply thereto (Docket No. 19) it is hereby ORDERED that Defendant's motion is **GRANTED**. Accordingly, judgment is entered in favor of Defendant, Deluxe Check Printers, and against Plaintiff, Carl Emberger.

BY THE COURT:

RONALD L. BUCKWALTER, J.